U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 28 July 2005

BALCA Case No.: 2005-INA-00079
ETA Case No.: P2003-VA-03389513

In the Matter of:

ACME MECHANICAL CONTRACTORS, INC.,
Employer,

on behalf of

JOSE ANTONIO MARTINEZ-CHICAS,
Alien.

Appearance: Fredy R. Lopez
Manassas, Virginia
Agent for the Employer

Certifying Officer: Stephen W. Stefanko
Philadelphia, Pennsylvania

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Acme Mechanical Contractors, Inc. (hereinafter "the Employer") filed an application for labor certification[1] on behalf of Jose Antonio Martinez-Chicas (hereinafter "the Alien") on April 26, 2003 (AF 403).[2] The Employer seeks to employ the Alien as a Sheet Metal Mechanic (Occ. Code: 804281010). *Id.* This decision is based on the record upon which the

[1] Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182 (a)(5)(A) and 20 C.F.R. Part 656. This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2005). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

[2] In this decision, "AF" is an abbreviation for Appeal File.

Certifying Officer (hereinafter "CO") denied certification and the Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c).

BACKGROUND

In its application, the Employer described the duties of the position as follows: "Knowledge to read blueprints, to properly install ductwork in new homes under construction. After the ductwork has been installed throughout the house, the prospective employee also has to install the furnace and leave it ready for the electricians to do the electrical work. Experience on [sic] reading and laying H.V.A.C." The Employer required two years of experience in the job offered. The Employer also stated that the employee should be able to finish the job assigned without extra supervision and able to work a very flexible schedule (AF 403).

In the Notice of Findings (hereinafter "NOF"), issued April 30, 2004, the CO found that the Employer failed to comply with 20 C.F.R. § 656.21(b)(6) which requires an employer to document whether U.S. workers applied for the job opportunity, and whether they were rejected solely for lawful, job-related reasons. The CO found that the Employer did not demonstrate "good faith" recruitment since the Employer did not address any effort to contact the U.S. applicant, Timothy Brown, who was referred by the local Job Service.

The Employer submitted rebuttal on June 3, 2004 (AF 293-393). In its rebuttal, the Employer quoted the CO's NOF stating, "Although telephone calls were unsuccessfully placed to U.S. applicants, no certified mailings or other attempts to contact the applicants were made." The Employer argued that the CO had approved other labor certifications with "unsuccessful phone calls" or "no response" in recruitment reports. In support of its argument, the Employer attached copies of some documents from other labor certification cases.

The CO issued a Final Determination on July 13, 2004 (AF 290-292). In the Final Determination, the CO stated that the Employer must provide documentation establishing that U.S. applicants were rejected solely for lawful, job-related reasons, the Employer must document "good faith" recruitment, and reasonable efforts to contact U.S. applicants may require more than a single type of attempted contact. The CO found that the Employer had provided no

documentation that the U.S. applicant is not qualified for the job opportunity. The CO also noted that the letter from the Virginia Employer Commission to the Employer had provided explicit instructions on how to document good faith recruitment efforts. The CO then concluded that the Employer's failure to contact the U.S. applicant at the time of application was considered an untimely contact. The CO determined that since the Employer failed to show that the U.S. applicant was not able, willing, qualified or available for this job opportunity at the time of application, the Employer's rejection of the U.S. applicant was for other than lawful, job-related reasons. Thus, the application for labor certification was denied.

On August 17, 2004, the Employer requested review of the denial of labor certification (AF 1). In support of its request for review, the Employer submitted copies of some documents from other labor certification applications which had been granted (AF 1 – 289). The Employer argued again that in these other labor certification applications, the CO had accepted unsuccessful phone calls or "no response" as minimally acceptable efforts of recruitment. The instant case was docketed by the Board on December 13, 2004.

DISCUSSION

Under 20 C.F.R. § 656.21(b)(6), an employer must document that U.S. applicants were rejected solely for lawful, job-related reasons. Therefore, an employer must take steps to ensure that it has found lawful, job-related reasons for rejecting U.S. applicants, and may not stop short of fully investigating an applicant's qualifications. Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a requirement is implicit. *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by an employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

Here, the Employer alleges that unsuccessful telephone contacts or "no response" determinations have been accepted as good faith recruitment efforts by the Certifying Officer in

other labor certification applications and, therefore, this application should be similarly approved. In this particular application, however, as noted by the CO in the NOF, there is no documentation that the Employer made *any* effort to contact the U.S. applicant. The Appeal File does not contain any document showing that the Employer ever attempted to telephone the U.S. applicant referred by the local Job Service. Rather, the Employer stated on March 25, 2003 that no U.S. workers responded to the notice of filing or the newspaper advertisement (AF 400-402).

An employer must make efforts to contact qualified U.S. applicants in a timely fashion after the receipt of resumes from the state job service agency. Failure to timely contact the U.S. applicants indicates a failure to recruit in good faith. *Loma Linda Foods, Inc,* 1989-INA-289 (Nov. 26, 1991) (*en banc*). In this case, the Employer's failure to make any contact with the U.S. applicant referred by the state job service agency is a clear failure to recruit in good faith.

We note some inconsistency in the Employer's arguments in this case. The NOF stated, "Your results of Recruitment statement dated March 25, 2003, indicates no U.S. applicants contacted you. However, U.S. applicant, Timothy Brown, was referred to you by the local Job Service office on 1/7/03. *You did not, however, address any efforts made by you to contact him*." (emphasis added) (AF 395). The Employer then erroneously stated that the NOF provided that, "Although telephone calls were unsuccessfully placed to U.S. applicants…." In fact, the CO never stated that unsuccessful calls were placed. There is no documentation in this case that the Employer ever placed any telephone calls. Thus, the Employer's arguments regarding whether or not unsuccessful telephone calls would be minimally acceptable are not applicable where there is no documentation that any telephone calls were ever placed.

In summary, since the Employer did not make any contact with the U.S. applicant referred by the local job service, the Employer has failed to demonstrate a good faith effort to recruit U.S. applicants. Therefore, the Employer has not demonstrated a lawful, job-related reason for rejecting the U.S. applicant. Accordingly, we find that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs